Supreme Court, U. S.
FILED
FEB 12 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1007

HOWMET CORPORATION, HOWMEDICA, INC., and WAYNE PHARMACAL SUPPLY CO., INC.,

Petitioners,

vs.

MERCANTILE NATIONAL BANK OF CHICAGO, HAROLD I. SNYDER, SNYDER MANUFACTURING CO., INC., and ZIMMER MANUFACTURING COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
GENERAL STATEMENT	1
REVISED STATEMENT OF FACTS	2
REASONS WHY THE WRIT SHOULD BE DENIED	4
The Petition Presents No Question Of The Type Contemplated By Court Rule 19	4
The Contention That The Mandates Of *Graham* v. *John Deere Co.* Were Not Followed, Is Unfounded	4
No Error Was Committed Either By The Trial Court Or By The Court Of Appeals, As To Petitioners' Unfounded Contentions Of Unclean Hands	6
CONCLUSION	7

LIST OF AUTHORITIES CITED

Graham v. John Deere Co., 383 U.S. 1 (1966) 4, 5

Mercantile National Bank of Chicago, et al. v. Quest, Inc., et al., 303 F. Supp. 926 (N.D. Ind., 1969); aff'd. 431 F. 2d 261 (C.A. 7, 1970); cert. den. 401 U.S. 956 .. 2, 5

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GENERAL STATEMENT

Petitioners present their Petition to this Court, from concurring decisions by the United States District Court for the Northern District of Indiana, South Bend Division, and the United States Court of Appeals for the Seventh Circuit, finding McElvenny et al Patent No. 3,-115,138 to be valid and infringed. The Memorandum and Opinion, Findings of Fact and Conclusions of Law,

by the Trial Court, and the Opinion of the Court of Appeals, are all set forth in the Appendix to the Petition.

The said McElvenny et al Patent No. 3,115,138 has previously been held valid and infringed by the same Courts in earlier published decisions,* as to which Certiorari was denied by This Court.**

REVISED STATEMENT OF FACTS

Petitioners, in the section of their Petition designated "Background" (pages 5-6), make several statements, as fact, which are unsupported by the Record and which are contrary to specific findings by the Courts below, upon the Record in the case.

First, Petitioners say, as to the Barron Squeeze Bottle, that it was "reasonably dependable" (page 5), whereas the Trial Court specifically found (Finding 32, A. 45)*** that the Plaintiff-Patentees rejected the use of plastic squeeze bottles which had many of the same physical, operative and structural characteristics and deficiencies as the Barron Squeeze Bottle. On review, the Court of Appeals found, upon the evidence, that (A. 5):

* *Mercantile National Bank of Chicago, et al v. Quest, Inc., et al*, 303 F. Supp. 926 (N.D. Ind., 1969); aff'd. 431 F. 2d, 261 (C.A. 7, 1970).

** 401 U.S. 956 (1971).

*** Appendix to the Petition.

> "At most, the record shows that Barron bottles or similar devices were used by some surgeons who now appear to have abandoned them."

Petitioners also say (page 6), as to patentee Gregory Sullivan, that he was "hired to invent" whereas the Trial Court specifically found (Finding 42, A. 47) that Sullivan was not employed to develop or invent a specific or particular product in the medical field; that he did developmental work on the "Hemovac" evacuator on his own time using his own facilities (Finding 43, A. 47); and that he was under no contractual duty, express or implied, to assign his interest in the patent in suit to the Richey Manufacturing Company (Finding 44, A. 47).

Petitioners go on (page 6) to refer to a "series of nefarious acts", without factual support for the assertion made. They also boldfacedly state that there was a "secreting" of Richey's rights and "ignor[illegible]" on the part of the bankruptcy trustee; whereas the Trial Court specifically found that the information transmitted to the bankruptcy trustee was not incomplete so as to amount to fraudulent concealment, and that the trustee had ample opportunities to obtain information from easily accessible sources (Finding 46, A. 47-A. 48).

It is submitted that Petitioners should not assert, as fact, that which is not supported by the Record, and which is contrary to findings made by the Trial Court.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition Presents No Question Of The Type Contemplated By Court Rule 19

The Petition herein presents no matter of national concern and no matter of dominant concern to either the general law or the patent law. Neither has any conflict between the Circuits been shown. The matter is simply that Petitioners are dissatisfied with the concurring decisions of the Courts below and the Petition seeks a further review.

The Contention That The Mandates of *Graham v. John Deere Co.* Were Not Followed, Is Unfounded

The answer to Petitioners' Questions I and II (Petition, page 2) is that the mandates of this Court in *Graham v. John Deere Co.** were in fact followed both by the Trial Court and the Court of Appeals.

The Trial Court specifically considered all of the prior art brought to its attention by Petitioners, and in particular the Barron Squeeze Bottle.

Upon analysis of the various considerations referred to by this Court in *Graham v. John Deere*, the Trial Court specifically found (Finding 33, A. 45):

> "33. The differences between the claimed subject matter and the prior art Barron Squeeze Bottle would not have been obvious to a person of ordinary skill in the art of medical appliances in the period of 1959-1960 when the invention covered by U. S. Patent No. 3,115,138 was made."

* 383 U.S. 1 (1966).

In addition to the Barron Squeeze Bottle, Petitioners perfunctorily relied upon certain additional prior art patents and publications, most of which were of record in the previous *Quest* case. The Trial Court also considered these, and determined as follows (Finding 37, A. 46):

> "37. The prior patents relied on by Defendants were either considered by the Patent Office or were no better than the patents which were considered by the Patent Office. None renders obvious the invention of the patent in suit."

The Court of Appeals considered the Barron Bottle at some length. That Court reviewed its structure, and the differences relative to the claimed structure of the patent in suit (A. 2-A. 3). The Court of Appeals concluded, as did the District Court, that, in view of the structural deficiencies of Barron, the claimed subject matter of the patent in suit was not obvious (A. 4-A. 5). It is no criticism of the Court's decision that the Court recognized and considered the similarities between the Barron Bottle and the Dakin syringe which had been extensively considered as prior art in the previous *Quest* case.*

Before the Court of Appeals, Petitioners argued, as here, that the Trial Court had not followed the mandates of *Graham v. John Deere Co., supra*; and the Court of Appeals decided that such contention was without merit (A. 5-A. 6).

* Similarities which Appellants' (Petitioners') counsel in fact conceded at oral argument.

No Error Was Committed Either By The Trial Court Or By The Court Of Appeals, As To Petitioners' Unfounded Contentions Of Unclean Hands.

Question III (page 2) of the Petition attacks the findings by the Courts below regarding Petitioners' unfounded contentions of unclean hands.

Before the Trial Court, Petitioners contended that the patentees were guilty of unclean hands, by reason of certain alleged relationships between the patentees and Richey Manufacturing Company, and its bankruptcy trustee. Respondents urged that the contentions made were unfounded, and that they were in any event not a proper legal defense to the Plaintiffs' action for patent infringement.

The Trial Court elected to consider the matters urged, upon their merits, and specifically found that Gregory Sullivan was not employed to develop or invent a specific or particular product in the medical field (Finding 42, A. 47); that Gregory Sullivan did developmental work on the "Hemovac" evacuator on his own time using his own facilities (Finding 43, A. 47); that Gregory Sullivan, and the other inventors, were under no contractual duty, express or implied, to assign their interest in the patent in suit to the Richey Manufacturing Company (Finding 44, A. 47); and that any distribution rights or rights to sell which Richey might have had were not an "asset" of the company and scheduling in the bankruptcy of the company was not required (Finding 45, A. 47).

The Court of Appeals agreed with Respondents as to their threshold position, viz., that the matters urged by Petitioners relating to an alleged third party equitable ownership interest in the patent was not a proper defense in a patent infringement suit. The Court of

Appeals' decision cites ample authority (A. 6, A. 7) and clearly delineates Petitioners' contentions from a defense of unclean hands in relations with the Petitioners, or a defense of fraud or other impropriety in the procurement of a patent, or other matter of public interest.

Thus, the decisions below on the question of unclean hands find against Petitioners on two counts, namely, upon the merits in the Trial Court, and in the Court of Appeals upon the ground that the matters urged do not, in any event, constitute a proper defense in a patent infringement action. Petitioners' Question III presents no issue necessary or appropriate for review.

CONCLUSION

The Petition raises no question necessary or appropriate for review by This Court, or requiring remand to the Court of Appeals. Therefore, it is respectfully requested that the Petition be denied.

Respectfully submitted,

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